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Brian Kabala

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LHF PRODUCTIONS, INC., a Nevada
Corporation,

Plaintiff,

vs.

AGUSTIN BERTOLIN, an individual; MARIA
GONZALEZ, an individual; BRIAN KABALA,
an individual; JOHN KOEHLIY, an individual;
DANIEL O'CONNELL, an individual;
DONALD PLAIN, an individual; DAVID
POOR, an individual; ANTE SODA, an
individual; MATTHEW STEWART, an
individual; AARON TAKAHASHI, an
individual; and JOHN AND JANE DOES, 1-10,

Defendants.

BRIAN KABALA, an individual,

Counter-Plaintiff,

vs.

LHF PRODUCTIONS, INC., a Nevada
Corporation,

Counter-Defendant.

CASE NO. 2:16-cv-02028-JAD-NJK

**COUNTER-PLAINTIFF'S MOTION
TO STRIKE COUNTER-
DEFENDANT'S RESPONSE [ECF
NO. 202] TO HIS MOTION FOR
RECONSIDERATION**

**COUNTER-PLAINTIFF'S MOTION TO STRIKE COUNTER-DEFENDANT'S
RESPONSE [ECF NO. 202] TO HIS MOTION FOR RECONSIDERATION**

Counter-Plaintiff Brian Kabala ("Kabala"), by and through his counsel of record, hereby respectfully moves this Court pursuant to Fed. R. Civ. P. 26, 34 and 37 to strike Counter-Defendant LHF Productions, Inc.'s ("LHF") Response to Kabala's Motion for Reconsideration [ECF No. 202] in its entirety, or at minimum to strike all evidence presented for the first time in LHF's Response.

As more fully set forth in the Memorandum below, because LHF seeks to rely upon evidence that was not properly produced in discovery during the pendency of this case, LHF should not be allowed to use, rely on or reference any information not previously provided.

Dated this 23rd day of October, 2018.

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By

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*Attorneys for Defendant/Counter-Plaintiff
Brian Kabala*

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

At the time this case was dismissed, in August of 2018, LHF had produced a handful of documents in the form of typed charts of unknown origin, the 2014 expert report of Simone Richter, the November 2017 expert report of Robert Young, and expert reports of Benjamin Perino and Stephen Bunting, and a number of requested contracts. The last bates-numbered document produced to Kabala was labeled 396 and was produced on August 21, 2018. (Declaration of Lisa L. Clay, attached hereto as Exhibit A, at ¶ 2.) Now, in its response to Kabala's motion for reconsideration, LHF seeks to introduce new documents [ECF No. 202-7 and 202-8] and what amounts to revised expert reports in the form of declarations from Benjamin Perino and Stephen Bunting. Kabala submits that all of this new evidence is improper.

II. LEGAL ARGUMENT

A. Rule 26

Fed. R. Civ. P. 26(a)(1)(A) requires the disclosure of the following:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of *all documents*, electronically stored information, and tangible things *that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses*, unless the use would be solely for impeachment.

B. Rule 37

Fed. R. Civ. P. 37(c) authorizes striking information or witnesses not properly disclosed:

(1) *Failure to Disclose or Supplement. If a party fails to provide information* or identify a witness as required by Rule 26(a) or (e), *the party is not allowed to use that information or witness to supply evidence on a motion*, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

...
(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i) – (vi) [which includes striking pleadings in whole or in part].

///

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C. Application of Applicable Rules

Failure to disclose at the appropriate time – in this case, prior to the case being dismissed – comes at a cost: “the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial.” Fed. R. Civ. P. 37(c)(1). *See, e.g. Colony Ins. Co. v. Kuehn*, No. 2:10-cv-01943-KJD-GWF, 2011 U.S. Dist. LEXIS 106884 at *13 (D. Nev. Sept. 20, 2011); *Cohan v. Provident Life & Accident Ins. Co.*, No. 2:13-cv-00975-LDG (CWH), 2015 U.S. Dist. LEXIS 124256 at *3 (D. Nev. Sept. 17, 2015); *Costa v. Global Experience Specialists, Inc.*, No. 2:14-cv-00153-RFB-PAL (D. Nev. Sept. 23, 2016). “The decision whether to impose Rule 37(c)(1) sanctions is given wide latitude,” both as to the considerations made and the penalty assessed. *Cohan*, 2015 U.S. Dist. LEXIS 124256 at * 4.

Such is the case here. LHF had nearly two years to produce documents and evidence. LHF was the subject of three requests for production. LHF produced prior expert reports that it did not seek to amend. Instead of producing Exhibits 2 and 3 in discovery, disclosing new or amended expert reports, or seeking leave in the context of this Motion to enter new evidence, LHF submits bates-labeled documents as though they had been produced, attempting to mislead both Kabala and this Court as to their origin and production status. LHF has made no effort to suggest that their failure was substantially justified or is harmless, nor can it: forcing Kabala to respond to an entirely new version of the facts, as well as new expert opinions, in the context of an opposition to a motion for reconsideration of a case ending order cannot be justified and is far from harmless. *See e.g. Morrison v Quest Diagnostics, Inc.*, No. 2-14-cv-01207, 2016 US. DIST. LEXIS 82515 at *8 (D. Nev. June 22, 2016) (“The burden is on the party facing discovery sanctions under Rule 37(c)(1) prove harmlessness.”) The plain truth is that Exhibits 2 and 3 and the entirely new version of facts that Benjamin Perino and Stephen Bunting now suggest are an unjustified and wholly improper attempt to re-create this record. They should all be stricken.

III. CONCLUSION

Discovery was ended when this Court issued its Order Dismissing All Claims and Closing Case on August 24, 2018. There is not a scintilla of evidence that the “facts” to which Mr. Perino and Mr. Bunting now aver, and which LHF relies upon to contest reconsideration,

1 were not known prior to the close of discovery, could not have been adduced prior to the close of
2 discovery and/or could not have been produced to Kabala. It is improper for them to now put
3 forth such evidence for the first time, in this context. LHF's Response, or at minimum the
4 portions of it containing improper new evidence, should be stricken and costs awarded to Kabala
5 for having to file and pursue this Motion.

6 DATED this 23rd day of October, 2018.

7 **KOLESAR & LEATHAM**

8
9 By

JONATHAN D. BLUM, ESQ.

Nevada Bar No. 009515

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 23rd day of October, 2018, I caused to be served a true and correct copy of foregoing **COUNTER-PLAINTIFF'S MOTION TO STRIKE COUNTER-DEFENDANT'S RESPONSE [ECF NO. 202] TO HIS MOTION FOR RECONSIDERATION** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Rule 5-4 of the Local Rules of Civil Practice of the United States District Court for the District of Nevada, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.


An Employee of KOLESAR & LEATHAM

KOLESAR & LEATHAM
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EXHIBIT A

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UNITED STATES DISTRICT COURT
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 DANIEL O'CONNELL, an individual;
 DONALD PLAIN, an individual; DAVID
 POOR, an individual; ANTE SODA, an
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BRIAN KABALA, an individual,

Counter-Plaintiff,

vs.

LHF PRODUCTIONS, INC., a Nevada
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Counter-Defendant.

CASE NO. 2:16-cv-02028-JAD-NJK

**DECLARATION OF LISA L. CLAY,
 ESQ. IN SUPPORT OF MOTION TO
 STRIKE COUNTER-DEFENDANT'S
 RESPONSE [ECF NO. 202] TO HIS
 MOTION FOR
 RECONSIDERATION**

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**DECLARATION OF LISA L. CLAY, ESQ. IN SUPPORT OF MOTION TO STRIKE
COUNTER-DEFENDANT'S RESPONSE [ECF NO. 202] TO HIS MOTION FOR
RECONSIDERATION**

I, LISA L. CLAY, ESQ., declare that:

1. I am an attorney licensed in Illinois, Washington and Washington D.C. I have been practicing law since 2002. I represent Defendant Brian Kabala pro hac vice in the above-referenced matter. I make these statements upon my personal knowledge of the facts stated herein.

2. On August 21, 2018 Mr. Austin's office forwarded an index of all documents produced by LHF. Document bates labeled 396 was the last document produced to Kabala in this litigation, and was the only document produced that day. *See Exhibit A.* Documents bates labeled 419 – 425 and 430 [ECF No. 202-7 and 202-8] were not produced to Kabala prior to the Court's August 24, 2018 dismissal.

I, Lisa L. Clay, declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

EXECUTED this 23rd day of October, 2018.

/s/ Lisa L. Clay, Esq.
LISA. L. CLAY, ESQ.

EXHIBIT A

Jonathan D. Blum

From: Brianna Show <bshow@weidemiller.com>
Sent: Tuesday, August 21, 2018 3:39 PM
To: Lisa Clay; Jonathan D. Blum; jcedmondson@edmolaw.com
Cc: F. Christopher Austin
Subject: LHF/Kabala - LHF 000396
Attachments: LHF Production's Bates Numbered Index.docx; LHF 000396.pdf

Follow Up Flag: Follow up
Flag Status: Completed

Dear Counsel,

Attached, please find our updated index and the document assigned as bates number LHF 000396.

Thank you,

Brianna Show

Weide & Miller, Ltd.

Patents, Trademarks, Copyrights, Trade Secrets and Related Litigation

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LHF PRODUCTIONS, INC.

v.

KABALA ET AL.

Case No.: 2:16-cv-02028-JAD-NJK

Material Produced by LHF Productions, Inc.

BATES NUMBERS	DESCRIPTION	DATE PRODUCED	CONFIDENTIAL
LHF 000001-000006	Plaintiff's Initial Disclosures	5/29	
LHF 000007-000022	Plaintiff's Answers to First Set of Interrogatories	5/29	
LHF 000023-000043	Plaintiff's Responses to First Set of Requests for Production	5/29	
LHF 000044-000051	Plaintiff's Answers to Second Set of Interrogatories	5/29	
LHF 000052-000058	Plaintiff's Responses to Second Set of Requests for Production	5/29	
LHF 000059-000064	Plaintiff's Responses to Third Set of Request for Admission	5/29	
LHF 000065-000070	Letter re Discovery Meet and Confer dated January 3, 2018	5/29	
LHF 000071-000077	Plaintiff's Amended FRCP 26(a) Disclosures	5/29	
LHF 000078-000089	Expert Report of Benjamin Perino	5/29	
LHF 000090-000096	Expert Report of Robert D. Young	5/29	
LHF 000097-000141	Expert Report of Stephen M. Bunting – Exhibit 5	5/29	
LHF 000142-000143	Gmail – FW: LHF/Kabala meet and confer January 4, 2018 10:00 a.m. PST Large File Recipient Access	5/29	
LHF 000144-000145	Additional Evidence – 68.96.200.163	5/29	
LHF 000146	Infringement Capture Log – 68.96.200.163	5/29	

LHF 000147	Captures native PDF file	6/28	
LHF 000148-000149	Event log native PDF file	6/28	
LHF 000150	.tar file (thumb drive)	6/28	
LHF 000151	.torrent file (thumb drive)	6/28	
LHF 000152	Event log native excel file	6/28	
LHF 000153	Captures native excel file	6/28	
LHF 000154	Control Copy of LHF Film (DVD)	6/28	
LHF 000155	Additional Evidence excel file	6/28	
LHF 000156	Infringement Capture Log – Perino Report Exhibit B	6/11	
LHF 000157-000158	Event Log File – Perino Report Exhibit C	6/11	
LHF 000159	Additional Evidence Log – Perino Report Exhibit D	6/11	
LHF 000160-000165	Contingent Fee Agreement between Chaz Rainey and Carl Crowell – Not Fully Executed	7/6	X
LHF 000166-000174	Agreement between Copyright Management Services, Ltd. And Millennium Media, Inc.	7/6	X
LHF 000175-000177	Millennium Engagement Carl Crowell	7/6	X
LHF 000178-000184	ME – Online Copyright Infringement Logging Services Agreement	7/6	X
LHF 000185-000189	Engagement Agreement between LHF Productions, Inc. and Weide & Miller, Ltd.	7/6	X
LHF 000190-000193	Executed Agreement between Chaz Rainey and Carl Crowell	7/24	
LHF 000194-000212	October 10, 2014 Certificate of Recordation from USCO, Document Cover Sheet, Sales Agreement between LHF and Nu Image, Inc. with Exhibit A – Delivery Materials, Schedule C – Laboratory Access Letter, and Attachment 1 - Materials	7/24	
LHF 000213-000216	October 2, 2014 Certificate of Recordation from USCO, Document Cover Sheet, and Assignment between A&T Pictures, Inc. and LHF Productions, Inc.	7/24	

LHF 000217-000222	April 3, 2015 Certificate of Recordation from USCO, Document Cover Sheet, Assignment between A&T Pictures, Inc. and LHF Productions, Inc.	7/24	
LHF 000223-000229	October 17, 2014 Certificate of Recordation from USCO, Document Cover Sheet, and Production Services Agreement LHF Productions, Inc. and LHF Films Limited (Film Production Company)	7/24	
LHF 000230-000233	October 2, 2014 Certificate of Recordation from USCO, Document Cover Sheet, and One Picture License for "London Has Fallen" between A&T IP, Inc. and LHF Productions, Inc.	7/24	
LHF 000234-000235	Certificate of Registration for Registration No. PA 1-982-831 effective as of March 14, 2016 for the original motion picture titled London Has Fallen	7/24	
LHF 000236-000237	Certificate of Registration for Registration No. PAu 3-789-521 effective as of October 7, 2014 for the original motion picture screenplay London Has Fallen	7/24	
LHF 000238-000243	REDACTED - Contingent Fee Agreement between Chaz Rainey and Carl Crowell – Not Fully Executed	7/24	
LHF 000244-000252	REDACTED - Agreement between Copyright Management Services, Ltd. And Millennium Media, Inc.	7/24	
LHF 000253-000255	REDACTED - Millennium Engagement Carl Crowell	7/24	
LHF 000256-000262	REDACTED - ME – Online Copyright Infringement Logging Services Agreement	7/24	
LHF 000263-000267	REDACTED - Engagement Agreement between LHF	7/24	

	Productions, Inc. and Weide & Miller, Ltd.		
LHF 000268-000271	Public - Executed Agreement between Chaz Rainey and Carl Crowell	7/24	
LHF 000272-000275	Schedule of Counsel between Interallip LLP, Hughes Socol Piers Resnick Dym, Ltd., Crowell Law and Millennium Films, Inc./Nu Image, Inc.	7/24	
LHF 000276-000280	License Agreements / Granting of Rights between Nu Image, Inc. and Copyright Collections Ltd.	7/24	
LHF 000281-000285	Engagement Letter re Legal Representation for Enforcement of Rights	7/24	
LHF 000286-000291	Millennium Rights Enforcement - January through March 2017		X
LHF 000292-000299	Millennium Rights Enforcement - April through June 2017		X
LHF 000300-000307	Millennium Rights Enforcement - July through September 2017		X
LHF 000308-000318	2017 Quarter 3 Millennium Report		X
LHF 000319-000324	2017 Quarter 4 Millennium Report		X
LHF 000325-000328	2018 Quarter 1 Millennium Report		X
LHF 000329-000373	2017 Quarter 1 Millennium Client Report		X
LHF 000374-000395	2017 Quarter 3 Millennium Client Report		X
LHF 000396	2016-2017 Report	8/21	X